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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a tax refund suit may be brought under 28 U.S.C. 1346(a)(1) to obtain a refund of amounts paid by respondent to the Internal Revenue Service to obtain the release of a federal tax lien on her property when the lien arose out of the tax liabilities of a third person.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	4
Reasons for granting the petition	7
Conclusion	15
Appendix A	1a
Appendix B	7a

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 104 F. Supp. 997 (Ct. Cl. 1952)	10
Busse v. *United States*, 542 F.2d 421 (7th Cir. 1976)	7, 13
Clift & Goodrich, Inc. v. *United States*, 56 F.2d 751 (2d Cir. 1932)	11
Colorado Nat'l Bank v. *Bedford*, 310 U.S. 41 (1940)	11
Eighth Street Baptist Church, Inc. v. *United States*, 431 F.2d 1193 (10th Cir. 1970)	8
First Nat'l Bank v. *United States*, 265 F.2d 297 (3d Cir. 1959)	8
Flora v. *United States*, 362 U.S. 145 (1960)	10
George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933)	11
Hofheinz v. *United States*, 511 F.2d 661 (5th Cir. 1975)	8
Lac Courte Oreilles Chippewa Indians v. *United States Internal Revenue Serv.*, 845 F.2d 139 (7th Cir. 1988)	8
Luce v. *United States*, 444 F. Supp. 347 (W.D. Mo. 1977)	10

Cases—Continued: Page

Martin v. *United States*, 895 F.2d 992 (4th Cir. 1990) 7, 8, 10
Naus v. *Brodrick*, 103 F. Supp. 233 (D. Kan. 1951) 10
Ohio Locomotive Crane Co. v. *Denman*, 73 F.2d 408 (6th Cir. 1934), cert. denied, 294 U.S. 712 (1935) 11
Parsons v. *Anglim*, 143 F.2d 534 (9th Cir. 1944) ... 7
Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp. v. *United States*, 22 F.3d 741 (7th Cir. 1994) 8
Phillips v. *United States*, 346 F.2d 999 (2d Cir. 1965) 8
Snodgrass v. *United States*, 834 F.2d 537 (5th Cir. 1987) 7, 8, 10, 12
Stahmann v. *Vidal*, 305 U.S. 61 (1938) 10, 11
United States v. *Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958) 7
Wourdack v. *Becker*, 55 F.2d 840 (8th Cir.), cert. denied, 286 U.S. 548 (1932) 11

Statutes:

26 U.S.C. 6321 5
26 U.S.C. 6322 4
26 U.S.C. 6323(a) 5
26 U.S.C. 6325(a)(1) 13
26 U.S.C. 6325(b)(3) 3, 12
26 U.S.C. 6502(a)(1) (Supp. IV 1992) 13
26 U.S.C. 6511(a) 2, 9
26 U.S.C. 6532(a) 13
26 U.S.C. 6532(c) 13
26 U.S.C. 7422 ..... 3, 13
26 U.S.C. 7422(a) 9, 10

Statutes—Continued: Page

26 U.S.C. 7422(b) 11
26 U.S.C. 7426 ..... 3, 12, 13
26 U.S.C. 7426(b)(4) 4, 12
26 U.S.C. 7701(a)(14) 9, 11
28 U.S.C. 1346(a) 2
28 U.S.C. 1346(a)(1) 2, 6, 7, 8, 9, 10, 12-13
28 U.S.C. 1346(a)(2) 2
28 U.S.C. 2410(a) 2
28 U.S.C. 2410(a)(1) 2, 12

Miscellaneous:

H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966) .. 12
S. Rep. No. 1708, 89th Cong., 2d Sess. (1966) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-6a) is reported at 24 F.3d 1143. The opinion of the district court (App., *infra,* 7a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1994. On August 9, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1346(a) provides, in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any expressed or implied contract with the United States * * *.

2. 28 U.S.C. 2410(a) provides, in relevant part:

> * * * [T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to * * *
>
> * * * * *
>
> real or personal property on which the United States has or claims a mortgage or other lien.

3. 26 U.S.C. 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if

> no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

4. 26 U.S.C. 7422 provides, in relevant part:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (b) Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

5. 26 U.S.C. 6325(b)(3) provides:

> Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge [of federal tax lien] of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the Secretary, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.

6. 26 U.S.C. 7426 provides, in relevant part:

> (a)(1) If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that

such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

* * * * *

(b)(4) If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

STATEMENT

This case concerns a payment made to the United States by respondent Lori Williams to remove a federal tax lien from property held in her name. The lien arose from taxes owed by her husband, Jerrold Rabin, who owned the property with respondent as joint tenant at the time the taxes were first assessed.

1. In April 1975, before respondent and Rabin were married, they purchased real estate in Pacific Palisades, California, as joint tenants. More than a decade later, in June 1987 and March 1988, federal employment tax assessments totalling $14,907 were made against Rabin. Gov't C.A. Br. 3. Those federal tax assessments arose from Rabin's status as general partner of a partnership known as Marco Polo 1. App., *infra,* 2a. Although Rabin and respondent were married at that time, the taxes were owed by Rabin separately and not by respondent (*id.* at 8a-9a).

A federal tax lien securing all taxes, interest and penalties owed by Rabin arose "at the time the assessment [was] made" (26 U.S.C. 6322). This lien reached "all

property and rights to property, whether real or personal, belonging to" him at that time. 26 U.S.C. 6321. Pursuant to 26 U.S.C. 6323(a), however, this lien in Rabin's property was not valid "as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice [of the lien was] filed by the Secretary." *Ibid.*

After the assessments were made, and before notice of the resulting federal tax lien was filed in the local property records, Rabin transferred his joint interest in the real estate to respondent. On October 25, 1988, he recorded a quitclaim deed to the property naming respondent as the title holder. App., *infra,* 8a. Record title therefore vested exclusively in respondent as of that date.

Sixteen days later, on November 10, 1988, the Internal Revenue Service recorded notice of the federal tax lien arising from Rabin's employment tax obligation. App., *infra,* 8a. At various times between November 28, 1988, and March 27, 1989, the IRS made additional assessments for unpaid employment tax liabilities against Rabin in amounts totalling $26,487. Notices of federal tax lien with regard to those additional amounts were filed on June 22, 1989, and July 24, 1989. See CR 10 at 3 (Exhs. B, C, D).

On January 19, 1989, respondent commenced proceedings to dissolve her marriage with Rabin. The decree of divorce was granted on March 19, 1990. App., *infra,* 7a n.1.

2. On May 9, 1989, while the divorce petition was pending, respondent entered into an agreement to sell the property. On June 26, 1989, the IRS filed notice of an additional federal tax lien in the name of "LORI RABIN aka LORI WILLIAMS" as nominee, alter ego and holder of a beneficial interest in the property for Rabin. App., *infra,* 8a. Respondent asserts that, after receiving notice of this

lien, she authorized disbursement of funds from the closing proceeds to pay the tax lien in order to permit the sale to close and to avoid a lawsuit by the purchasers of the property. *Ibid.*

On July 3, 1989, the tax claims of the United States, along with the claims of a number of other creditors, were paid through the sale escrow. Rabin's outstanding federal tax liability of $41,369 was paid in this manner. App., *infra,* 2a, 8a. At the time of this disbursement, respondent's marriage to Rabin had not been dissolved.

3. Respondent thereafter filed an administrative claim for refund of the amount paid to the United States at her direction. Her refund claim was denied. On September 30, 1991, respondent commenced this action in federal district court seeking a refund of the $41,369 paid to the United States, plus interest, costs, and attorney's fees, under 28 U.S.C. 1346(a)(1). That statute provides jurisdiction in the federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The district court granted summary judgment to the United States. App., *infra,* 7a-18a. The court concluded that a federal tax refund suit may not be brought under 28 U.S.C. 1346(a)(1) by any party other than the taxpayer who is liable for the taxes at issue. The court noted that "[t]he Supreme Court has twice in recent months reaffirmed a restrictive approach to waiver of sovereign immunity" and that "a majority of the Circuits which have addressed [the issue before the court] have held that a

narrow construction of section 1346(a)(1) is appropriate and limits standing to sue under the statute to the taxpayer against whom the tax was assessed" (App., *infra,* 9a-10a, 11a). The court rejected, as erroneous, the contrary holding of the Fourth Circuit in *Martin* v. *United States,* 895 F.2d 992 (1990), that a person who pays taxes owed by a third party may bring a refund action under 28 U.S.C. 1346(a)(1). App., *infra,* 16a-17a.

4. The Ninth Circuit reversed. App., *infra,* 1a-6a. Following the Fourth Circuit's holding in *Martin* v. *United States, supra,* the court of appeals held that 28 U.S.C. 1346(a)(1) "clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes" (App., *infra,* 4a, quoting 895 F.2d at 994). In so ruling, the court of appeals expressly disagreed with the contrary holdings of the Fifth and Seventh Circuits in *Snodgrass* v. *United States,* 834 F.2d 537 (5th Cir. 1987), and *Busse* v. *United States,* 542 F.2d 421 (7th Cir. 1976). The court of appeals stated that the latter opinions "fail to give sufficient attention to the plain language of section 1346(a)(1)" (App., *infra,* 6a). The court of appeals further explained that its decision to follow *Martin* was supported by earlier decisions of the Ninth Circuit which, though decided under different statutory provisions, had allowed third parties to sue for refunds of taxes they had paid but did not owe. App., *infra,* 5a, citing *United States* v. *Halton Tractor Co.,* 258 F.2d 612 (9th Cir. 1958), and *Parsons* v. *Anglim,* 143 F.2d 534 (9th Cir. 1944).

REASONS FOR GRANTING THE PETITION

A conflict exists among the courts of appeals on the common, recurring question presented in this case. The court of appeals held in this case that a person who pays taxes owed by another may bring a tax refund suit under

28 U.S.C. 1346(a)(1). In so ruling, the court of appeals adopted the reasoning and conclusion of the Fourth Circuit in *Martin* v. *United States,* 895 F.2d at 994. In contrast with the decision in this case, the Seventh Circuit has recently reaffirmed its position that "only persons legally liable for paying a given federal tax may bring a refund suit" under 28 U.S.C. 1346(a)(1). *Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp.* v. *United States,* 22 F.3d 741, 743 (1994). Several other circuits have agreed with the Seventh Circuit that 28 U.S.C. 1346(a)(1) does not create jurisdiction for tax refund suits brought by persons who have paid taxes owed by a third party. *E.g., Snodgrass* v. *United States,* 834 F.2d 537, 539 (5th Cir. 1987); *Eighth Street Baptist Church, Inc.* v. *United States,* 431 F.2d 1193, 1194 (10th Cir. 1970); *Phillips* v. *United States,* 346 F.2d 999, 1000 (2d Cir. 1965); *First Nat'l Bank* v. *United States,* 265 F.2d 297, 299-300 (3d Cir. 1959). See also *Lac Courte Oreilles Chippewa Indians* v. *United States Internal Revenue Serv.,* 845 F.2d 139, 142 (7th Cir. 1988); *Hofheinz* v. *United States,* 511 F.2d 661, 662 (5th Cir. 1975).

Absent resolution of the clear conflict among the circuits on this recurring question, the treatment of claims for refunds by third parties will continue to vary solely due to geographical happenstance. For the reasons we will describe, the analysis adopted by the court of appeals in this case misinterprets the interlocking provisions Congress has enacted to provide remedies for non-taxpayers and, in doing so, threatens to provide a mechanism for the delay or evasion of tax collection.

1. Respondent seeks a refund of taxes she paid that were owed by her husband. Her tax refund claim does not fall within the jurisdiction afforded by 28 U.S.C. 1346(a)(1). That provision establishes jurisdiction in the federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The jurisdiction described by that provision, however, is expressly limited by 26 U.S.C. 7422(a), which provides, in *haec verba,* that (*ibid.*; emphasis added):

> *[n]o suit or proceeding shall be maintained in any court* for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.*

In turn, 26 U.S.C. 6511(a) provides that such a claim for refund or credit must be filed, within specified time limits, "by the taxpayer" (*ibid.*). The term "taxpayer" is defined in the Internal Revenue Code to mean "any person subject to any internal revenue tax." 26 U.S.C. 7701(a)(14).

Reading these provisions as a whole, only a "taxpayer" (under 26 U.S.C. 7701(a)(14)) who has filed a timely claim for refund (under 26 U.S.C. 6511(a)) is authorized to maintain a suit for refund in any court (26 U.S.C. 7422(a)) for the erroneous collection of the tax or for any other sum wrongfully collected under the internal revenue laws (28 U.S.C. 1346(a)(1)).[1] The Second, Third, Fifth, Seventh

[1] In the course of a lengthy, historical review of the antecedents of the tax refund procedures existing at the time of the decision on

and Tenth Circuits have thus correctly concluded that the jurisdiction described in 28 U.S.C. 1346(a)(1) exists only for suits brought by a "taxpayer." See page 8, *supra*. See also *Luce* v. *United States*, 444 F. Supp. 347, 348 & n.1 (W.D. Mo. 1977); *Bailey* v. *United States*, 104 F. Supp. 997, 1000-1001 (Ct. Cl. 1952); *Naus* v. *Brodrick*, 103 F. Supp. 233, 234-237 (D. Kan. 1951).

By contrast, the Ninth Circuit in this case (App., *infra*, 4a-6a) and the Fourth Circuit in *Martin* v. *United States*, 895 F.2d at 994, incorrectly viewed 28 U.S.C. 1346(a)(1) in isolation. In particular, these courts failed to consider the express limitations established in 26 U.S.C. 7422(a) on the jurisdiction provided by 28 U.S.C. 1346(a)(1). By failing to consider the plain language of *all* of the applicable statutes, the Fourth and Ninth Circuits reached an incorrect understanding of the statutory scheme.[2]

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rehearing in *Flora* v. *United States*, 362 U.S. 145 (1960), the Court noted that 26 U.S.C. 7422(a), by its terms, creates no jurisdiction and is thus not itself "a jurisdictional statute at all" (362 U.S. at 152). By limiting the circumstances in which a suit of the type specified under 28 U.S.C. 1346(a)(1) may "be maintained in any court" (26 U.S.C. 7422(a)), however, the statute limits the scope of the jurisdiction afforded under the other provision. The language of the two statutes, which is in *haec verba*, must be read together to determine which suits may be maintained within the jurisdiction of the federal district courts.

[2] Of the nine conflicting circuit court decisions (see page 8, *supra*), only the Fifth Circuit (*Snodgrass* v. *United States*, 834 F.2d at 539) cited this Court's decision in *Stahmann* v. *Vidal*, 305 U.S. 61 (1938). In *Stahmann*, the Court held that a cotton producer who paid a federal "cotton ginning" tax could bring a refund action for the allegedly unconstitutional tax. Although the ginning tax was imposed directly on cotton ginners, the Court concluded that the producers could bring refund suits in their own names because the tax "was intended to fall, and the [Bankhead Cotton] Act attempted to make it fall, upon the producers." *Id.* at 65. Concluding that the tax was, in substance, imposed on the producers, the Court noted that the unique

2. Congress has provided non-taxpayers with remedies other than a tax refund suit. In particular, a person (such as respondent) who believes that a tax lien arising from

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"scheme of the [Bankhead Cotton] Act sets the case apart from any to which our attention has been called arising under other taxing acts." *Ibid.*

Having resolved the case on this basis, the Court added, in dicta, that "[w]hether or not the tax was imposed upon the [producers], they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods [to remove the ginning tax lien]." 305 U.S. at 66. The "accepted principles" described in *Stahmann* apparently related to a common law restriction on tax refund suits. Prior to 1924, a taxpayer could not bring a refund suit to recover taxes for which he was personally liable *unless* the taxes had been paid under protest or duress. See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 375-377 (1933). In 1924, however, Congress added what is now 26 U.S.C. 7422(b) to the Internal Revenue Code, expressly to permit a taxpayer to bring a refund suit "whether or not such tax, penalty, or sum has been paid under protest or duress" (*ibid.*). See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. at 375-377. The only appellate decisions cited by the Court in *Stahmann* (305 U.S. at 64 n.6) related to a different point: they drew a distinction between (i) plaintiffs who paid assessments which they believed (correctly or not) had been made against them, who were permitted to bring a refund suit as the "taxpayer," and (ii) plaintiffs who "knowingly" (and in this sense "voluntarily") paid taxes *owed by a third party*, who were *not* allowed to bring a refund suit. See *ibid.*, citing, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d 408, 411 (6th Cir. 1934) (the statute "gives no aid to one who 'pays another's tax actually due, with full knowledge of what he is doing' "), cert. denied, 294 U.S. 712 (1935); *Clift & Goodrich, Inc.* v. *United States*, 56 F.2d 751, 753 (2d Cir. 1932); *Wourdack* v. *Becker*, 55 F.2d 840, 842 (8th Cir.), cert. denied, 286 U.S. 548 (1932).

Since 1938, this Court has cited its decision in *Stahmann* v. *Vidal* only once. In *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940), the Court cited *Stahmann* for the proposition that "[t]he taxpayer is the person ultimately liable for the tax itself." *Id.* at 52. See also 26 U.S.C. 7701(a)(14) (defining the term "taxpayer" to mean "any person subject to any internal revenue tax"). In the present case, it is undisputed that it is Rabin, not respondent, who "is the person ultimately liable for the tax itself" (*Colorado Nat'l Bank* v. *Bedford*, 310 U.S. at 52).

the obligations of someone else has improperly been imposed on her property may commence an action to "quiet title" to that property under 28 U.S.C. 2410(a)(1). The validity of the federal tax lien could be adjudicated in that action. If that remedy would be inadequate to permit a desired, prompt sale of the property, a person in respondent's position would be able to obtain an immediate certificate of discharge of the federal tax lien by agreeing with the Secretary to hold the proceeds of such a sale "as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property" (26 U.S.C. 6325(b)(3)). The respective rights of the non-taxpayer and the United States in such a fund (in particular, the validity of the federal tax lien in the property) are then to be determined in a suit brought in federal district court under 26 U.S.C. 7426(b)(4).[3]

These express remedies for non-taxpayers under Title 26 would be made largely superfluous under the interpretation of 28 U.S.C. 1346(a)(1) adopted in this case. In enacting 26 U.S.C. 7426 in 1966, however, Congress had a quite different view. The legislative history reflects that, prior to that statute's enactment, the courts had generally held that the United States could not "be sued by third persons where its collection activities interfere with their property rights." S. Rep. No. 1708, 89th Cong., 2d Sess. 29-31 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 27-29 (1966). As the Fifth Circuit noted in *Snodgrass* v. *United States*, 834 F.2d at 539, in concluding that 28 U.S.C.

[3] Similarly, the Internal Revenue Code provides a comprehensive set of remedies for any non-taxpayer who asserts that the United States has wrongfully levied on his property to collect taxes. These remedies are set forth in 26 U.S.C. 7426, which is entitled "Civil Actions By Persons Other Than Taxpayers." No such levy occurred in this case.

1346(a)(1) does not afford jurisdiction for refund suits by non-taxpayers, "[t]he legislative history of [26 U.S.C. 7426] indicates Congress's intent that it, rather than an expansively-interpreted § 1346(a)(1), serve as the remedy for third parties harmed by tax levies." See also *Busse* v. *United States*, 542 F.2d at 425.

3. The analysis adopted by the court of appeals threatens to provide a haven for delay or evasion of tax liabilities. Indeed, the facts of this case present a model that other taxpayers could employ for this purpose.

a. When a taxpayer's obligation has been paid by a third party, the Treasury would have no basis for pursuing further collection efforts. Since no outstanding tax obligation would remain, there would be no basis for collecting any further tax. Moreover, any outstanding lien on the taxpayer's property would be discharged. See 26 U.S.C. 6325(a)(1) (providing for the release of liens when the tax liability "has been fully satisfied").

b. If a non-taxpayer who had paid the taxpayer's obligation were thereafter permitted to bring a suit for a refund under 28 U.S.C. 1346(a)(1), within the period permitted by the statute of limitations,[4] and were to prevail on the theory that the lien on her property had been invalidly imposed, it could then be too late for the United States to pursue further collection actions against the taxpayer. See 26 U.S.C. 6502(a)(1) (Supp. IV 1992) (suit for collection to be brought within ten years of the assessment). Even if the statute of limitations for collection had not expired, the fact that liens on the taxpayer's property

[4] 26 U.S.C. 6532(a), entitled "Suits by Taxpayers For Refund," generally provides a two-year statute of limitations for refund suits from the date that notice of disallowance of the refund claim is mailed by the Secretary. By contrast, 26 U.S.C. 6532(c) generally requires a non-taxpayer to commence suit for wrongful levy under 26 U.S.C. 7422 within nine months of the date the levy occurred.

were discharged when the taxes were previously paid (by the non-taxpayer) would obviously hinder further tax collection efforts.

c. Under the analysis adopted by the court of appeals in this case, a taxpayer may thus seek to delay or evade final collection of his tax obligations by the artifice of having the taxes paid by another person, who would then assert a claim that the payment made by her was erroneous. No doubt recognizing the risks and complications that would result from "tax refund" actions by non-taxpayers, Congress has provided wholly separate remedies for taxpayers and non-taxpayers. The decision in this case erroneously focussed on only one of the applicable statutory provisions and thereby misunderstood the elaborate, interlocking scheme that Congress has enacted.

4. The question presented in this case is one of substantial recurring importance. In the absence of a decision from this Court, the treatment of claims for refunds by third parties will vary solely because of the circuit in which the taxpayer happens to reside. Review by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56207
D.C. No. CV-91-5286-WMB

LORI RABIN WILLIAMS, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge Presiding

Argued and Submitted
March 10, 1994—Pasadena, California

Filed May 19, 1994

Before: HARRY PREGERSON, DIARMUID F. O'SCANNLAIN,
and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge O'SCANNLAIN

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether one who erroneously pays the taxes of another may sue for a refund.

I

In April 1975, Jerrold Rabin ("Rabin") and his then wife Lori Rabin (now Lori Williams) ("Williams") purchased a house in Pacific Palisades, California. On June 29, 1987, and March 28, 1988, the government assessed employment tax liabilities against Rabin. On October 20, 1988, Rabin transferred all of his interest in the house to Williams as her separate property. On October 25, 1988, Rabin recorded a quitclaim deed giving title to "Lori Williams an unmarried woman."[1] On November 10, 1988, the Internal Revenue Service ("IRS") filed the first in a series of tax liens against the property in order to satisfy outstanding employment taxes owed by Rabin and Marco Polo 1, a partnership in which Rabin was a general partner. On January 19, 1989, Williams filed a petition for dissolution of her marriage to Rabin.

On approximately May 9, 1989, Williams entered into an escrow agreement to sell the house. On June 26, 1989, the IRS recorded another lien. Under protest, Williams authorized disbursement of $41,369 to the IRS so that she could convey clear title. On March 19, 1990, Williams' marriage to Rabin was dissolved.

After her administrative claim for refund was denied, Williams filed suit in federal district court under 28 U.S.C. § 1346(a)(1) for a refund of the money owed by Rabin which she had paid to the IRS, plus interest, costs, and attorneys' fees. The parties filed cross-motions for summary

[1] The couple was still married at the time.

judgment. The government argued lack of jurisdiction because 28 U.S.C. § 1346(a)(1) does not allow suits by third-party plaintiffs. On September 2, 1992, the district court denied Williams' motion for summary judgment and granted the government's motion for summary judgment. The district court held that a third party who is not liable for a tax, but who pays it in order to remove a lien against property, may not sue for a refund under 28 U.S.C. § 1346(a)(1). Williams timely appealed.

II

Jurisdiction is the only issue before this court. The government argues that section 1346(a)(1) limits standing to the "taxpayer," defined as the person against whom the taxes were assessed. Title 28 U.S.C. § 1346(a) reads:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws. . . .

Williams contends that section 1346(a)(1) specifically grants jurisdiction for taxes that are "erroneously collected" which is precisely what happened to her. In response, the government argues "that the Government's consent to be sued must be construed strictly in favor of the sovereign." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (internal quotations omitted).

Although the government is correct that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed,' " *id.* at 1014, we believe

that the language of section 1346(a)(1) clearly permits such suit. The Fourth Circuit addressed this same issue in *Martin* v. *United States,* 895 F.2d 992 (4th Cir. 1990). In *Martin,* the IRS filed a lien against property which then belonged, after a divorce, to the former wife ("Martin"), to satisfy the tax liabilities of the former husband. Martin paid the tax in order to remove the lien so that she could sell the property with clear title. She then sued for a refund under 28 U.S.C. § 1346(a)(1). The district court dismissed the suit for lack of jurisdiction, but the Fourth Circuit reversed. The Fourth Circuit relied on "a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax 'alleged to have been erroneously or illegally *assessed* or *collected.*' " *Martin,* 895 F.2d at 994. The court concluded that "[t]he statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appellant[ ] because [she] did not owe them." *Id.*

We find the reasoning of the Fourth Circuit persuasive and adopt *Martin* as the law of this circuit. The facts in the case before us are similar. As in *Martin,* "there is no question in this case but that the taxes paid by the appellant[ ] were erroneously collected," *id.*; in open court, the government conceded its 1989 lien was not valid against Williams' property.[2]

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[2] Our decision is consistent with the Supreme Court's requirement of an "unequivocal expression" to sustain a waiver of sovereign immunity. *United States v. Nordic Village, Inc.,* 112 S. Ct. 1011, 1014 (1992). That case concerned an ambiguous waiver of sovereign immunity under § 106 of the Bankruptcy Code, whereas the plain language of § 1346(a)(1) unambiguously covers *all* cases of erroneous tax assessment and collection.

Our decision to follow *Martin* is consistent with prior precedent. In *Parsons v. Anglim,* 143 F.2d 534, 536 (9th Cir. 1944), we held that a widow who erroneously paid her husband's income taxes after his death had standing to bring suit for a refund because she had been told that if she did not pay her husband's taxes immediately, she would have to pay penalties to the government. Similarly, in *United States v. Halton Tractor Co.,* 258 F.2d 612 (9th Cir. 1958), this court granted standing to a third party who erroneously paid the taxes of a delinquent taxpayer. In *Halton Tractor,* two corporations, Halton and Durston, sold equipment to a contractor, Watson, and executed conditional sales contracts to secure payment. Because Watson owed approximately $10,000 in taxes to the government, the IRS put notices on the machinery stating "Property of the United States Government (Notice of Seizure)." These notices were incorrect because Halton and Durston had superior claims. After paying Watson's taxes to remove the lien, Halton and Durston sued for a refund. We held that Halton and Durston did have standing, following *Parsons,* because the payments were not intended to benefit Watson or the government.

The government argues that subsequent legislation makes it doubtful whether *Parsons* and *Halton Tractor* are still applicable because in 1966, Congress adopted section 7426 of the Internal Revenue Code, which explicitly authorized third-party suits against the government in the case of wrongful government levies. Two other circuits have so reasoned. In *Busse v. United States,* 542 F.2d 421 (7th Cir. 1976), the Seventh Circuit held that a third party who erroneously pays the taxes of another person could not bring a suit for refund under section 1346(a)(1). The court reasoned that *Halton Tractor* must be viewed in light of the fact that the Code at the time did not provide a remedy for nontaxpayers harmed by a wrongful govern-

ment levy but that the addition of section 7426 addressed this problem and, therefore, section 1346 need not be contorted for equity's sake. *Id.* at 425. In *Snodgrass v. United States,* 834 F.2d 537 (5th Cir. 1987), the Fifth Circuit followed the Seventh Circuit and held that section 1346(a)(1) does not allow suit by a party other than the taxpayer against whom the taxes were assessed. *Id.* at 538.

We are unpersuaded by the Fifth and Seventh Circuits' attempts to distinguish *Parsons* and *Halton Tractor.* Rather, we follow the better-reasoned analysis in *Martin* and reject *Busse* and *Snodgrass,* which fail to give sufficient attention to the plain language of section 1346(a)(1).

Since Williams has standing to sue under section 1346(a)(1), the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 91-5286 WMB

LORI (RABIN) WILLIAMS, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Sept. 2, 1992;
Entered Sept. 3, 1992]

ORDER

I. Background.

Plaintiff Lori Williams brings this action under 28 U.S.C. § 1346(a)(1) seeking a refund of $41,369.58, plus interest, costs, and reasonable attorney's fees, from the United States. These funds were paid to the Internal Revenue Service (the "IRS") through escrow on the sale of plaintiff's home as a result of collection actions taken by the IRS against Williams' ex-husband,[1] Jerrold Rabin, and Marco Pollo I, a partnership in which Rabin was formerly a partner.[2]

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[1] Plaintiff filed a petition for dissolution of the marriage on January 19, 1989. A judgment dissolving the marriage was entered on March 19, 1990.

[2] Marco Pollo 1 and its partners were assessed with employment taxes in the amount of $41,369.58 between June of 1987 and December of 1988.

Plaintiff and Jerrold Rabin purchased the real estate in question in April 1987. On October 20, 1988, they executed an agreement transferring all of Jerrold Rabin's interest in the property to plaintiff as her separate property. On October 25, 1988, Jerrold Rabin recorded a quitclaim deed, naming plaintiff as title holder. On November 10, 1988, after Rabin had given up his interest in the property, the IRS recorded the first in a series of tax liens on the property against Marco Pollo I and Rabin.

On May 9, 1989, plaintiff entered into an escrow agreement to sell the property. On June 26, 1989, seven days before the closing of escrow, the IRS recorded a nominee lien on the property in the name of "Lori Rabin aka Lori Williams". Plaintiff received notice of this lien and asserts that she consequently authorized disbursement of funds to the IRS under protest to permit escrow to close and to avoid a lawsuit by the buyers. On July 3, 1989, a number of creditors, including the IRS, were paid through escrow.

Plaintiff seeks a refund based on the following assertions: (1) she is not the taxpayer; (2) she was not assessed and given notice and demand as to the subject tax liabilities; (3) the liens were against Marco Pollo I, a partnership and its partners, not against her; (4) the subject property had been transferred to her for adequate consideration prior to the filing of the subject tax liens, and therefore the liens could not attach to the subject property; (5) she was not a nominee, with regard to the subject property, on behalf of Marco Pollo I or its partners; and (6) the underlying tax liability, as assessed against Jerrold Rabin for claims arising from taxable periods after December 31, 1987 (the date Rabin registered with the State Board of Equalization a notification that he was no longer a partner in Marco Pollo I) is invalid. The United States concedes "that plaintiff was not assessed with the subject tax liabilities; that she was not responsible for the partnership's . . .

tax liabilities; and, that she is not the taxpayer." Defendant's Motion For Summary Judgment, p. 12 lines 18-21.

The parties have filed cross motions for summary judgment. The United States argues that as a waiver of sovereign immunity, 28 U.S.C. § 1346(a)(1) must be narrowly construed so as to permit a refund suit only by the assessed taxpayer. The United States thus seeks dismissal of the action for lack of subject matter jurisdiction. Plaintiff argues that persons (hereinafter "non-taxpayers") other than the assessed taxpayer may pursue an action for refund under the plain language of section 1346(a)(1). Counsel have agreed that this matter comes before the Court in the posture of a trial on stipulated facts and that adjudication of the issue of plaintiff's standing to bring this suit is dispositive of the action.

II. Discussion.

28 U.S.C. § 1346(a)(1) acts as a waiver of the United States Government's sovereign immunity in affording district courts jurisdiction over refund suits. Section 1346(a)(1) states that district courts shall have original jurisdiction of:

> [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. . . .

The question before the Court is whether this waiver extends to suits brought by non-taxpayers.

The Supreme Court has twice in recent months reaffirmed a restrictive approach to waiver of sovereign im-

munity. In *United States Department of Energy v. Ohio,* 112 S.Ct. 1627 (1992), the Court recited the standard:

> [w]e start with a common rule, with which we presume congressional familiarity (citation omitted) that any waiver of the National Government's sovereign immunity must be unequivocal. (Citation omitted.) "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon v. United States,* 342 U.S. 25, 27, 72 S.Ct., 17, 19, 96 L.Ed. 26 (1951), and not 'enlarge[d] . . . beyond what the language requires.' *Eastern Transportation Co. v. United States,* 272 U.S. 675, 686 (1927)."

112 S.Ct. at 1633, quoting *Ruckelshaus v. Sierra Club,* 103 S.Ct. 3274, 3278 (1983). The Court went on to hold that Congress had not waived sovereign immunity from liability for civil fines imposed by a State for past violations of the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251, *et seq.,* or the Resource Conservation and Recovery Act of 1976, 90 Stat. 2795, 2796, as amended 42 U.S.C. § 6901 *et seq.*

In *United States v. Nordic Village, Inc.,* 112 S.Ct. 1011 (1992), the Supreme Court considered the question of whether 11 U.S.C. § 106(c) waives sovereign immunity from an action seeking monetary recovery in bankruptcy. Rejecting an effort to ground such waiver in the legislative history of the statute, the Court stated:

> the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report. (Citation omitted.)

112 S.Ct. at 1016. After considering several alternative readings of the text of section 106(c), the Court concluded that certain readings inconsistent with waiver "are assured-

ly not the only readings of subsection (c), but they are plausible ones – which is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." 112 S.Ct. at 1016.

Under the approach of *Nordic Village,* for plaintiff to prevail requires the Court to find that the language of section 1346(a)(1) unequivocally waives sovereign immunity with respect to suits by non-taxpayers and that no plausible reading of section 1346(a)(1) would preclude such suits.

While the Ninth Circuit has yet to speak specifically to the issue before the Court, a majority of the Circuits which have addressed it have held that a narrow construction of section 1346(a)(1) is appropriate and limits standing to sue under the statute to the taxpayer against whom the tax was assessed.[3] *See Snodgrass v. U.S.,* 834 F.2d 537, 540 (5th Cir. 1987); *Busse v. United States,* 542 F.2d 421, 425 (7th Cir. 1976); *Phillips v. United States,* 346 F.2d 999, 1000 (2d Cir. 1965); *Eighth Street Baptist Church, Inc. v. United States,* 431 F.2d 1193, 1194 (10th Cir. 1970). Defendant urges the Court to follow these decisions.

Plaintiff, on the other hand, directs the Court to the Fourth Circuit's decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990), which relied on a "plain reading" of section 1346(a)(1) to afford standing to non-

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[3] The harshness of this rule has been mitigated to some extent by the 1966 enactment of 26 U.S.C. § 7426 (entitled "Civil actions by persons other than taxpayers"). Section 7426 provides for an action by any person other than the assessed taxpayer to recover for property wrongfully levied upon. Because section 7426 comes into play only where there has been a levy, however, the majority interpretation of section 1346(a)(1) leaves non-taxpayers with no direct remedy against the IRS for tax payments made voluntarily to remove a lien.

taxpayers. Plaintiff also refers the Court to two Ninth Circuit decisions interpreting the statute which preceded section 1346(a)(1).

A. The Ninth Circuit Authority.

The Ninth Circuit afforded non-taxpayers standing to sue for refunds of erroneously collected taxes in two decisions applying the predecessor to section 1346. The former provisions, 26 U.S.C.A. Int. Rev. Code § 3772(a)(1) and (b), "authorize[d] the recovery of 'any sum * * * in any manner wrongfully collected' 'whether or not such * * * sum has been paid under protest or duress.' " *Parsons v. Anglim,* 143 F.2d 534, 535 (9th Cir. 1944). In *Parsons,* the plaintiff sought a refund of taxes she had paid under protest in anticipation that the collector would wrongfully claim the taxes were due from her as a transferee, and under the assumption that the purported liability would be minimized by prompt payment. The district court held that the plaintiff could not recover her voluntary payment of taxes which were due to the United States from another taxpayer. The Ninth Circuit reversed.

In *United States v. Halton Tractor Company,* 258 F.2d 612 (9th Cir. 1958), two corporations sought refunds for payment of social security and withholding taxes owed by an individual. The corporations had paid these taxes after the collector, claiming the tax lien to be superior to the corporations' security interests, threatened to sell certain equipment securing the individual's obligations to the corporations. The *Halton Tractor* court looked to *Parsons,* characterizing its holding as follows:

> [i]t is clear that the holding in that case was that since the wife did not owe the taxes, and since they could not be collected from her or her property, the Collector in receiving her checks "wrongfully collected the taxes"; that the absence of coercion or duress on the part of the Collector, or the fact that payment was made on plaintiff's own volition, was wholly immaterial so long as it could not be said that the payment was made as a donation for the benefit of the original tax debtor.

258 F.2d at 617. The court then relied on *Parsons* and "the plain language of Sec. 3772(b)"[4] to rule that the voluntary nature of the corporations' payment of the individual's tax liability did not preclude their recovery of a refund. 258 F.2d at 617.[5]

These more than thirty year old decisions plainly did not address the question of waiver of sovereign immunity in the restrictive manner required by *Nordic Village, supra.*

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[4] The specific language of § 3772(b) cited in *Halton Tractor* was as follows: "[s]uch suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress." *See Halton Tractor,* 258 F.2d at 616.

[5] In *David v. United States,* 551 F.Supp. 850 (C.D. Cal. 1982), the court attempted to reconcile *Parsons* and *Halton Tractor* with the majority position that persons paying the taxes of third parties to release tax liens on their property may not sue for refunds. The courts in the other circuits, according to *David,* had denied the plaintiffs standing "primarily because 26 U.S.C. § 7426 provided plaintiffs an opportunity to seek injunctive relief to prevent the IRS from a wrongful levy on their property in order to satisfy tax obligations of other parties." 551 F.Supp. at 853. In *David,* the plaintiff had paid money to the IRS on the incorrect assumption that he was personally liable for certain corporate tax obligations. The *David* court interpreted *Parsons* to stand for the proposition that "a person who pays a tax of a third party on the assumption that he was personally liable on that tax does have standing to bring a refund action for wrongfully collected taxes." *David,* 551 F.Supp. at 854, citing *Parsons,* 143 F.2d at 536-537. Of course, plaintiff in the instant action made no such assumption. Finally, *David* also cited *Halton Tractor* as lending support by analogy to the conclusion that the plaintiff had standing to pursue a refund action under section 1346(a)(1).

Indeed, neither decision distinguishes its approach to determination of such waivers from that generally taken to statutory interpretation. Moreover, both cases construe a statute—former section 3772 of title 26—other than the one presently at issue. *Halton Tractor* relies on former section 3772(b)'s language disavowing the relevance of protest or duress to infer that the Government "would not insist upon retaining moneys which it had received when it had no right to collect them." 258 F.2d at 617. Such language was not included in section 1346(a)(1), and even if it had been, this kind of inference would not comport with *Nordic Village*'s requirement of an unequivocal waiver in the statutory text. For these reasons, the Court declines to give *Halton Tractor* and *Parsons* significant weight.

B. The Majority Position.

Discussed below are two appellate decisions which fairly represent the majority position concerning the issue before the Court.

In *Busse, supra,* the Seventh Circuit directly addressed the question of "whether one who is not liable for a tax but pays it to remove a lien against his property may sue for a refund under 28 U.S.C. § 1346(a)(1)." 542 F.2d at 423. The court suggested that *Halton Tractor* "must be viewed in light of the failure of the Code prior to 1966 to provide a remedy for a third party whose property or interest in property was harmed by a wrongful government levy." *Id.* at 425. The court further observed that "[t]he Senate Report on 26 U.S.C. § 7426, which remedied this deficiency, noted that some courts tried to cure the inequitable situation by allowing suits in such cases against IRS' district directors." *Id.*, citing Sen. Rep. No. 1708, 89th

Cong., 2d Sess., 1966 *U.S. Code Cong. & Adm. News* at 3750.[6]

Noting the weight of authority for the proposition that a refund suit cannot be brought by a person who owns or has an interest in property that has been levied upon to satisfy the tax obligations of a third party, the *Busse* court concluded that there was no meaningful distinction where a person pays the tax of another to eliminate the threat of seizure and avoid a levy. The court also noted the obligation to construe waivers of sovereign immunity narrowly, 542 F.2d at 425, citing *Phillips, supra,* 346 F.2d at 1000. Finally, the court suggested the following alternative means to contest a tax lien: suit to quiet title under 28 U.S.C. § 2410; an action challenging a wrongful levy under 26 U.S.C. § 7426; and negotiation with the IRS to transfer the lien from the property to the proceeds of sale in order to clear title for conveyance. *Id.*

Snodgrass, supra, involved a wife seeking a refund of taxes paid by her husband out of community property and, she alleged, erroneously collected from her. The Fifth Circuit held that section 1346(a)(1) "does not allow suit by a party other than the taxpayer against whom the taxes were assessed, at least when the IRS has not coerced the payment by the third party." 824 F.2d at 538. Following *Busse,* the court rejected the plaintiff's assertion of coercion, noting that "the Snodgrasses themselves decided to sell their house; the IRS never demanded that they do so; and the IRS required payment of the proceeds only as a condition of releasing the tax liens so that the Snodgrasses'

[6] Under *Nordic Village,* it is clear that a determination of waiver of sovereign immunity may not rely on material outside the text of the statute at issue. 112 S.Ct. at 1016. *Nordic Village* does not address the propriety of considering such material in reaching a determination that no waiver has occurred.

buyer could receive clear title." *Id.* at 539-540. Acknowledging the inequity which might result from its ruling, the court quoted the Second Circuit's observation in *Phillips, supra,* that "the spirit property to judicial consideration of a waiver of sovereign immunity is not one of generosity and broad interpretation." *Id.*, quoting *Phillips,* 346 F.2d at 1000.

At the very least, the majority interpretation of section 1346(a)(1) reflected in these decisions establishes a plausible alternative to plaintiff's interpretation of the statute.

C. The Fourth Circuit Position.

The Fourth Circuit rejected the majority position concerning the jurisdiction reach of section 1346(a)(1) in *Martin* v. *U.S.,* 895 F.2d 992 (4th Cir. 1990). In that decision, which also involved the payment of another's tax liability in order to deliver clear title to the buyers of property, the court stated:

> [a]lthough appellants argue for a broad reading of the statute and the IRS argues for a narrow interpretation, we think the result of this case requires neither, but lies instead in a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax "alleged to have been erroneously or illegally *assessed* or *collected*. . . ." Although the statute is silent as to who can bring the action, implicit in its language is that one against whom the tax was erroneously assessed *or* collected has standing to do so.
>
> In the case at hand, after appellants paid the taxes, the IRS conceded that it did not have a valid lien on the property because [the taxpayer] did not have a sufficient ownership interest in it. Thus, there is no question in this case but that the taxes paid by the appellants were erroneously collected.
>
> The statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appelants because they did not owe them.

895 F.2d at 994 (emphasis original). Plaintiff relies heavily on *Martin,* asking the Court to apply it's reasoning directly to this case. Defendant suggests that after acknowledging tht waivers of sovereign immunity require strict construction, the *Martin* court erroneously abandoned that standard of interpretation for a less restrictive "plain reading" standard.

D. Analysis.

The *Martin* court did not have the benefit of the Supreme Court's subsequent decision in *Nordic Village.* In the wake of *Nordic Village*'s insistence on an unequivocal expression of waiver in the statutory text, 112 S.Ct. at 1016, *Martin*'s reasoning from an assertion which is "implicit in [the statute's] language" must be deemed infirm.

Furthermore, the interpretation of section 1346(a)(1) adopted by the majority of appellate courts which have addressed this issue—concluding that the waiver of sovereign immunity does not extend to refund suits by non-taxpayers—may not be characterized as implausible. Under *Nordic Village,* the existence of a plausible alternative reading denying plaintiff standing to bring a refund suit is fatal to plaintiff's position. *See id.* Section 1346(a)(1)'s silence with respect to whom may bring a refund suit creates an ambiguity which must be resolved in favor of the sovereign. *See, e.g., United States Department of Energy, supra,* 112 S.Ct. at 1643; *McMahon v.*

United States, 72 S.Ct. 17, 19 (1951). The Court therefore agrees with defendant's contention that the standard of statutory interpretation adopted by the *Martin* court is not sufficiently restrictive.

The Court further agrees with defendant that application of the appropriate standard compels a determination that section 1346(a)(1) does not waive the United States' Government's sovereign immunity from refund suits brought by persons other than the assessed taxpayer. Because plaintiff was not assessed with the taxes that she paid, her action under section 1346(a)(1) must be dismissed for lack of subject matter jurisdiction.

III. Conclusion.

Plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

DATED: Sept. 2, 1992

/s/ Wm. Matthew Byrne, Jr.

WM. MATTHEW BYRNE, JR.
United States District Judge

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